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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

KATRIN R. CHANDLER, an)
individual with senior water rights in)
the Horse Creek watershed; BETTY)
J. LANNEN, an individual with)
senior water rights in the Horse Creek)
watershed; POLLY REX, an)
individual with senior water rights in)
the Horse Creek watershed;)
JOSEPH MILLER, an individual with)
senior water rights in the Gallatin River)
Valley; and THE CLARK FORK)
COALITION, a non-profit organization)
with senior water rights in the Upper)
Clark Fork watershed,)
)
)
Petitioners.)
_____)

PETITION FOR DECLARATORY
RULING AND REQUEST
TO AMEND RULE 36.12.101 (13)

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LIST OF EXHIBITS

<u>No.</u>	<u>Title</u>
1.	Form 602, Notice of Completion of Groundwater Development
2.	Form 603, Montana Well Log Report
3.	EA Form R 1/2007, Environmental Assessment (for routine actions)
4.	Petition for Rulemaking, Gallatin County (2006)
5.	Order of Denial (Revised) of Gallatin County's 2006 Petition for Rulemaking, February 20, 2007
6.	1987 Montana Administrative Register (MAR) at 857, 1560 and 1993 MAR at 1335A
7.	HB 642, Senate Natural Resource Committee notes (March 23 and March 25, 1987)
8.	<u>Horace Bounds, Jr. et al., v. The State of New Mexico, CV-2006-166</u> (July 10, 2008)
9.	Upper Kittias Emergency Ground Water Rule, Chapter 173-539A Washington Administrative Code (WAC)
10.	Water Policy Interim Committee (WPIC), Approved Minutes, January 15, 2008
11.	Declaration of Tim Davis
12.	Martin, Curt. June 20, 2008. "Montana State Water Plan Issue/Discussion Paper," Water Resources Division, DNRC
13.	Levens, Russell. 2008. "Effects of Exempt Wells on Existing Water Rights," DNRC Staff Report

14. Kendy, E. and J.D. Bredehoeft, 2006. "Transient effects of groundwater pumping and surface water irrigation returns on stream flow." *Water Resources Research*, V. 42, 11 p.
15. WPIC, 2008 Findings, Water Supply & Sewage Disposal
16. Declaration and CV of John Gerstle
17. Declaration of Katrin R. Chandler
18. Declaration of Betty J. Lannen
19. Declaration of Polly Rex
20. Declaration of The Clark Fork Coalition
21. Crow Chief Meadows, Available Lots (last visited on 11/11/09)
22. Declaration of Joseph Miller

INTRODUCTION

Pursuant to §§ 2-4-501, 2-4-315 Mont. Code Ann. (“MCA”), and in accordance with Rules 1.3.227, 1.3.308 of the Admin. Rules of Mont. (“ARM”), Katrin R. Chandler, Betty J. Lannen, Polly Rex, Joseph Miller, and the Clark Fork Coalition (collectively “the petitioners”) respectfully submit this petition for declaratory ruling and request to amend the Department of Natural Resource’s (“DNRC’s”) definition of “combined appropriation” contained in Rule 36.12.101 (13), ARM. This action is required in order to bring the definition into compliance with the Montana Water Use Act, §§ 85-2-101 to 85-2-907, MCA.

The Montana Water Use Act (“the Act”) provides a limited exemption from the Act’s permitting and environmental review requirements for groundwater wells and developed springs “with a maximum appropriation of 35 gallons a minute [gpm] or less, not to exceed 10 acre-feet a year [ac-ft-yr].” § 85-2-306 (3)(a), MCA. This “exempt well” provision, however, does not apply to a “combined appropriation from the same source from two or more wells or developed springs” exceeding the 35 gpm/10 ac-ft-yr limitation. Id. As such, under the Act, a proposed subdivision involving two or more wells that seeks to appropriate water from the same source aquifer would still have to obtain a permit if the combined appropriation of all wells exceeds the limitation. See § 85-2-306 (3)(a), MCA. The importance of this legislative language, especially for Montana’s high-growth counties and closed basins, cannot be overstated because it

protects senior water rights holders and Montana’s water resource from the proverbial death by a thousand cuts. Individually minor but collectively significant groundwater withdrawals for subdivisions and other developments are not allowed to circumvent the Act’s permitting requirements and procedural safeguards. If the “combined appropriation” exceeds the 35 gpm/10 ac-ft-yr limitation, then a permit is required and the Act’s procedural safeguards are triggered. See id.

At issue in this petition is DNRC’s arbitrary interpretation of the legislature’s use of the term “combined appropriation” in the Act. According to DNRC, an appropriation of groundwater by two or more wells from the same aquifer is only deemed a “combined appropriation” if the developments are “physically manifold” or connected into the same system. See Rule 36.12.101 (13), ARM. In DNRC’s own words, the ground water developments must be “plumbed together by pipes” in order to qualify as a “combined appropriation.” Exhibit (Ex.) 12 at 3. Under this logic, a 1,000 lot subdivision with a 1,000 individual wells appropriating up to 10,000 ac-ft-yr of water from the same aquifer would be exempt from the Act’s permitting requirements and procedural safeguards. And, because very few, if any, groundwater developments in Montana are “physically manifold” (petitioners are not aware of any) DNRC’s definition effectively renders the Act’s combined appropriation exception superfluous. Indeed, there is absolutely no reason why a developer would install a groundwater system that is “physically manifold” and go through DNRC’s permitting and environmental review process when he can

simply install hundreds of individual wells for free, without a permit and without any environmental review.

As a consequence, there has been a surge in the number of exempt wells throughout the State, especially in Montana’s high-growth counties. There are currently well over 200,000 exempt wells in the State and DNRC estimates that by “2020, there could be between 32,000 and 78,000 additional exempt wells” in Montana. See Ex. 15. The number of exempt wells in Montana’s closed basins (i.e., areas that are already fully-appropriated) alone has “increased steadily at a rate of approximately 1,400 per year.” Ex. 13 at 6. Based on this trend DNRC estimates that “the number of exempt wells will increase by approximately 30,000” in closed basins by 2030. Id.

WHEREFORE, the petitioners – interested persons with senior water rights that are threatened by DNRC’s issuance of exempt wells – are hereby compelled to formally request that DNRC’s Rule defining “combined appropriation” be: (1) declared invalid; and (2) amended to bring it into compliance with the Act.

BACKGROUND

I. Water Rights in Montana.

Montana’s waters, in all their varied forms and locations belong to the State: “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people . . .” Art. IX, § 3 (3), Mont. Const.. Because Montana’s waters belong to the state, water rights holders do not own the water

itself. On the contrary, water rights holders possess only the right to use the water within the state's guidelines. See § 85-2-422, MCA.

The right to use Montana's waters – like many western states – is guided by the prior appropriation doctrine: “first in time, is first in right.” Under this doctrine, a person's right to use a specific quantity of water depends on when the use of the water began. The first person to use the water established the first right.¹ Before 1973, Montana state law provided two possible ways of perfecting a right of use: (1) a claimant could post a notice at the point of diversion and file a notice with the county clerk pursuant to the statute; or (2) simply put the water to use. See Montana Trout Unlimited (TU) v. Montana Department of Natural Resources and Conservation (2006), 331 Mont. 483 at 484, 133 P. 3d 224 at 226 (citations omitted). As the number of appropriators claiming water rights in Montana increased, however, the “adjudication of these rights became increasingly cumbersome and complex.” Id.

In 1972, the Montana Constitutional Convention took affirmative steps to remedy the problem. First, the Convention incorporated all past water rights into the new Montana Constitution. See Art. IX, § 3 (1), Mont. Const. (“[a]ll existing [water] rights . .

¹ During dry years, the person with the first right has the first chance to use the available water to fulfill that right. The holder of the second right has the next chance and so on. Water users in Montana, however, are limited to the amount of water that can be “beneficially used.” In Montana, the term “beneficial use” means generally “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.” § 85-2-102 (4), MCA.

.are hereby recognized and confirmed”). These “existing rights” included any right to use water that originated on or before July 1, 1973. See § 85-2-102 (12), MCA. Whether a right was obtained from filing a right, a use right, or a decreed water right (i.e., issued by a court after an adjudication), all are treated the same and deemed equally valid under the Montana Constitution.² Second, the Convention contained a directive to the legislature to “provide for the administration, control, and regulation of water rights and . . . establish a system of centralized records . . .” Art. IX, § 3 (4), Mont. Const. In response, the legislature promptly passed the Montana Water Use Act, §§ 85-2-101 to 85-2-907, MCA.

II. The Montana Water Use Act.

The Act represented one of the most comprehensive changes in Montana’s water rights laws in the State’s history. Under the Act, all water rights existing prior to July 1, 1973 are to be finalized through a statewide adjudication process.³ The Act also

² By recognizing these existing water rights, the Montana Constitution upheld and expressly adopted the prior appropriation or “first in time is first in use” doctrine and over a hundred years of precedent. In Montana, ground water withdrawn for a beneficial use is covered by a water right with a priority date just like a surface right. And, unlike other western states, “Montana does not have a preference for one type of use over any other, and water is supposed to be allocated strictly on the basis of who’s use was first. When there is not enough water for all uses, the earlier uses are supposed to get the water and the latter go without, regardless of what those uses are.” Ex. 12 at 11.

³ DNRC was charged with determining the priority dates for each filed claim. The Act further charged DNRC with inspecting conflicts concerning the priority of claims and established water courts for the adjudication of disputed claims. It soon became clear that there were significantly more adjudicated and legitimate non-adjudicated claims to water than there was available water. In response, the legislature enacted a moratorium on new

established a permit system for obtaining water rights for all new or additional water developments (both ground and surface water) in the State.

A. The permit system.

Administered by DNRC, the Act's permit system requires anyone who anticipates using more than 35 gallons a minute or 10 acre-feet a year of groundwater to apply for and obtain a permit to appropriate water from DNRC before any development begins or water is used. See § 85-2-301, MCA. The permit process involves two steps: (1) DNRC determines if the application contains the necessary information required by the Act and rules (the date DNRC receives the original permit application will be the priority date assigned to the appropriation); and (2) DNRC then weighs all of the evidence known to DNRC and documents whether the majority of evidence supports the issuance of a permit.

Specifically, before issuing a permit to appropriate groundwater, DNRC considers a number of criteria, including but not limited to whether water is physically available, whether water is legally available, the means of diversion, whether existing rights may be adversely affected, and the beneficial use of the proposed water. See § 85-2-311, MCA (criteria for issuance of permit).⁴ At this time, DNRC also prepares an environmental

water applications in specific, over-appropriated basins which are commonly referred to as "closed basins." See e.g., §§ 8-2-342 to 8-2-343, MCA (Upper Missouri River basin closure)

⁴ Additional criteria are required if a valid objection to the permit application is filed. See § 85-2-311 (2).

review to assess the direct, indirect, and cumulative impacts of the proposed appropriation of water under the Montana Environmental Policy Act (MEPA), §§ 75-1-101 to 75-1-1112. MEPA’s environmental review process is designed to aid DNRC in understanding the likely effects of the appropriation.⁵

Upon receiving a permit, the applicant’s next step is to implement the proposed project, divert or pump the water, and then put the water to beneficial use as outlined in the permit. When this is finished, the permittee must provide DNRC with a certified statement describing how the appropriation has been completed. At this time, DNRC will review the project completion notice and issue a Certificate of Water Right.

B. Exempt wells.

Under the Act, “a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10-acre feet a year.” § 85-2-306 (3)(a), MCA.⁶ As such, a

⁵ In theory, MEPA requires DNCR to carefully assess the cumulative impacts associated with an application to appropriate groundwater. See § 75-1-208 (11), MCA. A cumulative impact “means the collective impacts on the human environment of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.” § 75-1-220 (3). In practice, however, DNRC rarely conducts such an analysis, choosing instead to simply prepare a “checklist” environmental assessment that lacks any careful or meaningful analysis of cumulative impacts. See e.g., Ex. 3 (checklist EA).

⁶ This exemption does not apply to ground water applications inside the boundaries of a “controlled groundwater area.” § 85-2-306 (2), MCA. A controlled groundwater area “means an area that has additional management controls applied to new groundwater uses pursuant to 85-2-506 through 85-2-508, MCA.” Rule 36.12.101

person does not need to apply for or obtain a permit from DNRC to develop a groundwater well or spring if they are under the 35 gpm/10 ac-ft-yr threshold. No water application is required to be submitted to DNRC and none of the Act's criteria that DNRC reviews to ensure that water is physically or legally available are applicable. Nor are the environmental review provisions of MEPA.

Instead, to develop an exempt well under the Act, one must follow a very basic, ministerial process that includes: (1) drilling a well or developing a spring; (2) completing a well-log report (see Ex. 2) and sending a copy to the Bureau of Mines and Geology within 60 days; (3) putting the new well to use; and (4) submitting a notice of completion of groundwater development form (see Ex. 1) along with a filing fee of \$125 to DNRC. The priority date for such wells is the date that DNRC receives the completed groundwater development form. After DNRC reviews the form to ensure that it is correct and complete (for example, the person must have a possessory interest in the property) DNRC then issues a certificate of water right to the owner for the specified use. The process for obtaining a certificate of water right for an exempt well is, in DNRC's own words, nothing more than a "ministerial act." See Ex. 5 at 9. According to DNRC, "as it presently stands, Montana water law requires the Department to automatically grant water rights for wells less than 35 gallons per minute (gpm) up to 10 acre-feet as long as the

well is complete and the water has been put to beneficial use.” Id. at 11.⁷

In sum, with respect to exempt wells there is no review and oversight: No determination that water is physically or legally available, no identification of existing legal demands on the water source, and no concern or analysis of whether senior or existing rights will be adversely affected. Nor is there an assessment of direct, indirect, or cumulative impacts as required by MEPA. In addition, DNRC does not monitor individual wells (or require the well-owner to monitor his own well) to ensure that the 35 gpm/10 ac-ft-yr limitation is complied with. Individual wells across the State could be using more than the 35 gpm/10 ac-ft-yr limitation if the water is available. See Ex. 10 at 10, 16 (“wells are not monitored”). In DNRC’s own words: “The amount of water that is actually used . . . under the exemption is simply unknown since these uses are not metered and no one actually checks to see if the information provided by the applicant on the Form 602 and recorded by DNRC is correct.” Ex. 12 at 8.

⁷ Despite the ease at which DNRC grants certificate of water rights for exempt wells, and the lack of regulatory oversight, the agency estimates that overall compliance with the program is only around “60-70%.” Ex. 12 at 4. For example, “between January 1, 1994 and July 1, 2007, over 100,000 well logs were filed with the Bureau of Mines and Geology, but only about one-third as many Certificates of water rights were issued by DNRC.” Ex. 12 at 4. Another example “indicating relatively high rate of non-compliance would be the total number of lots granted subdivision approval to be served by exempt wells. In the last five years, DEQ approved over 30,000 such lots, while DNRC has issued 18,500 exempt Certificates for all uses and types of diversion, not just for domestic wells.” Id.

C. Combined appropriations.

The Act's exempt well provision (outlined above) which fast tracks the issuance of water rights for wells *does not* apply to a "combined appropriation from the same source from two or more wells or developed springs. . ." that exceed the 35 gpm/10 ac-ft-yr limitation. § 85-2-306 (3)(a), MCA. Such "combined appropriations" are required to obtain a permit. The Act does not define the term "combined appropriation." In 1987, DRNC defined the term as follows:

'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.'"

Ex. 6 at 1, 2 (excerpts from the 1987 Mont. Admin. Reg. (MAR). In 1993, DNRC changed the definition, which now reads:

'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, that are *physically manifold* into the same system."

Rule 36.12.101 (13), ARM (emphasis added).

ARGUMENT

I. DNRC's Definition of "Combined Appropriation" Should Be Declared Invalid.

Pursuant to the Montana Administrative Procedure Act (MAPA), DNRC is authorized to issue "declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." § 2-4-501, MCA. A rule may be declared invalid or inapplicable if it was "adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidence by documented legislative intent" or if the rule "interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff." § 2-4-506, MCA.⁸

Here, DNRC's definition of the term "combined appropriation" requiring that two or more wells be "physically manifold" should be declared invalid because it is: (1) inconsistent with the plain language, legislative intent, and underlying purpose of the Act; (2) threatens petitioners' senior water rights; and (3) undermines Article IX §§ 1, 3 and Article II § 17 of the Montana Constitution.

⁸ DNRC's Rule 1.3.226 (a), ARM states that a party may only seek a "declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights." The scope of this Rule is too narrow. MAPA expressly states that DNRC "shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the *applicability* of any statutory provision or of any rule or order of the agency." § 2-4-501, MCA (emphasis added). The word applicable means "relevant or appropriate." See NEW OXFORD AMERICAN DICTIONARY at 75 (2001). Here, DNRC's rule is inappropriate because it is inconsistent with the Act and threatens petitioners' rights. See § 2-4-506, MCA.

A. DNRC's definition conflicts with the Montana Water Use Act.

Statutory language “must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required.” Matteson v. Montana Power Company, (2000) 309 Mont. 506, 48 P. 3d 34; see also International Bhd. of Teamsters v. Daniels, 439 U.S. 551, 558 (1979) (“The starting point in every case involving construction of a statute is the language itself.”). The plain language of the Act is clear: “a *combined appropriation from the same source from two or more wells* or developed springs exceeding [the 35 gpm/10 ac-ft-yr] limitation requires a permit.” § 85-2-306 (3)(a), MCA (emphasis added).

The Act defines the word “appropriate” or “appropriation” to mean to “divert, impound, or withdrawal, including by stock for stock water, a quantity of water for a beneficial use.” § 85-2-102 (1). The Act does not define the word “combined.” In this situation, courts “normally construe [the word] in accord with its ordinary or natural meaning.” Smith v. United States, 508 U.S. 223, 228 (1993). The ordinary or natural meaning of the word “combine” is to unite as in “unite for a common purpose,” blend, merge, or “bring into such close relationship as to obscure individual characters.” See WEBSTER'S NEW COLLEGIATE DICTIONARY 262 (9th ed. 1987); NEW OXFORD AMERICAN DICTIONARY 341 (2001). Because the legislature uses the word “combined” as an adjective to describe the appropriation (the noun), the term “combined appropriation” in the Act suggests the legislature intended to capture groundwater

developments that: (1) are united for a common purpose, blended, or in a close relationship with one another, i.e., part of the same project, development, or subdivision; and (2) appropriate water from the same source aquifer. See § 85-2-306 (3)(a), MCA.

Notably, there is nothing in this ordinary and natural understanding of the term “combined appropriation” requiring groundwater development to be physically manifold or plumbed together into one system. Nor do the appropriations have to be developed simultaneously. On the contrary, individual wells appropriating water from the same source aquifer that are developed gradually or incrementally over time but part of the same development are still a “combined appropriation.” See e.g. Ex. 21. The salient inquiry is not physical connectedness of the wells or the timing of the withdrawals but the amount of water that is being appropriated from the same source aquifer from one development or subdivision.

The legislative history of the Act comports with this understanding. The combined appropriation language was added to the Act in 1987 from House Bill 642 (“HB 642”). During the Senate’s consideration of HB 642, an amendment was presented to the Senate Natural Resources Committee to include the explanatory phrase “wells from the same source” immediately after the term “combined appropriation.” See Ex. 7 at 2. According to the drafter, the purpose of new language was to make clear that “more than one well from the same source that brings in a 100 gallons a minute or more should also go

through the permitting process.” Id. at 1.⁹ The drafter clarified that “two wells that were irrigating the same tract but *not physically connected*” would be deemed a combined appropriation. Id. at 2 (emphasis added).¹⁰ Two days later, when the proposed language was before the Committee for vote, Senator Keating “inquired whether there was a question about the word ‘combined’ in the bill and both Ted Doney and Rep. Spaeth replied there was no problem with the word.” Id. at 3. Without further discussion, the proposed amendment to HB 642's combined appropriation exception which expressly clarified that it applied to two or more wells that are not physically connected was passed with a unanimous vote. See id.

On June 25, 1987 – three months after the HB 642 became law – DNRC published notice of proposed rulemaking defining the term “combined appropriation.” DNRC’s original definition was consistent with the legislative history: “‘Combined appropriation’ means an appropriation of water from the same source aquifer by two or more groundwater developments . . . [that] *need not be physically connected nor have a*

⁹ At the time of the 1987 amendment, a 100 gallons per minute (gpm) was the statutory limit on the flow rate for exempt wells. This rate was later reduced to 35 gpm in the 1991 legislative session.

¹⁰ The reference to the type of use (irrigation) in this portion of the legislative history is solely for illustrative purposes and is of no legal significance. This is because the exempt well provision is not restricted to specific types of use. In fact, each exempt certificate can be used for more than one type of water use. DRNC’s water rights “data base shows 31 distinct purposes for which the exemption has been used.” Ex. 12 at 8. These include domestic, stock-watering, lawn and gardening, irrigation, commercial, and “fish, wildlife or recreation.” Id.

common distribution system to be considered a ‘combined appropriation.’ Ex. 6 at 1, 2 (emphasis added). On August 31, 1987 DNRC adopted this definition without objection. Id. at 2. This was and remained DNRC’s interpretation of the term “combined appropriation” for nearly six years.

In June, 1993 DNRC decided to amend the definition removing all reference to “two or more wells” (even though this language is in the Act), deleting all references to developed springs, and mandating groundwater developments be “physically manifold” in order to be deemed “combined.” The Rule now reads:

‘Combined appropriation’ means an appropriation of water from the same source aquifer by two or more groundwater developments, that are *physically manifold* into the same system.

Rule 36.12.101 (13), ARM (emphasis added).¹¹

Under DNRC’s new definition, groundwater wells appropriating water from the same aquifer are only considered a “combined appropriation” and required to obtain a permit if they are “physically manifold” or physically connected. In other words, the appropriations must come from groundwater developments that are part of the same pipe

¹¹ No public hearing on the new definition was held and no public comment was received. See Ex. 6 at 4 (excerpts from 1993 MAR). Nor did DNRC provide a statement explaining why new “physically manifold” rule was reasonably necessary as required by the MAPA. See § 2-4-305, MCA (requisites for validity - authority and statement of reasons). This issue was raised by the Administrative Rules Committee in the one comment DNRC received on the Rule change. See Ex. 6 at 4. DNRC’s response was that the 1987 definition “was too ambiguous and therefore difficult to administer.” Id. No justification or rationale, however, was provided for the new “physically manifold” requirement which represented a substantial and significant change in the definition.

or system. According to DNRC, under this definition, “a subdivision with lots with individual wells that are not plumbed together by pipes can obtain a permitting exemption for each well on each lot, rather than treating a subdivision as a single ground water development for which a water use permit must be obtained.” Ex. 12 at 3. Absent the well-share situation, whereby two or more homes share one well (it is questionable whether this situation would even qualify as “two or more groundwater developments” under DNRC’s Rule), petitioners were unable to locate and are not aware of any “two or more groundwater developments” in the State of Montana that are “physically manifold” such that they would come under DNRC’s definition of a combined appropriation. Nor is there any logical reason why an appropriator would physically connect two groundwater wells which would require a permit when she could simply install individual wells that fall within the exemption created by DNRC’s definition of “combined appropriation.” As explained by DNRC, under the current definition, a person could put numerous wells on their property that together pump more than the 35 gpm/10 ac-ft-yr limitation without having to get a permit, so long as the wells are not physically connected. See Ex. 10 at 21. This absurd result is squarely contradicted by the plain language and legislative history of the Act.

In fact, as it now stands, DNRC’s definition replaces and renders meaningless the Act’s reference to “two or more wells or developed springs.” See § 85-2-306, (3)(a), MCA. Under DNRC’s interpretation one would have to either read out the legislature’s

reference to “two or more wells” in § 85-2-306 (3)(a) completely (as DNRC’s definition does) or assume that the legislature used the phrase “two or more wells” with the understanding that it meant two or more wells that are plumbed together. Neither of these interpretations are reasonable or legally viable. As noted by the Montana Supreme Court: “we must endeavor to avoid any statutory construction that renders any sections of the statute superfluous and does not give effect to all of the words used.” Matteson v. Montana Power Company, 2002, 309 Mont. 506, 510, 48 P. 3d 34, 36 (citations omitted); see also Dolan v. U.S. Postal Service, 546 U.S. 481, 486, (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . .”).

Here, the legislature used plain language to express its intent that “combined appropriations from the same source from two or more wells” that exceed the 35 gpm/10 ac-ft-yr limitation must obtain a permit. If the legislature wanted to limit the combined appropriations exemption to groundwater developments that are “physically manifold” or plumbed together then it surely would have said so in the Act. When viewed in this context, and in light of the plain language, legislative history and overall purpose of the Act, DNRC’s current Rule defining makes no sense and must be declared invalid. See State v. Brendal, 2009, 351 Mont. 395,402, 213 P. 3d 448, 452 (we must “read and construe the statute as a whole to avoid an absurd result and to give effect to a statute’s purpose.”).

B. DNRC's definition threatens petitioners' senior water rights.

A “rule may be declared invalid or inapplicable . . .if it is found that the rule . . .threatens to interfere with or impair the legal rights or privileges of the plaintiff.” § 2-4-506 (1), MCA. Pursuant to the MAPA, Petitioners must only demonstrate that their senior rights are threatened by issuance exempt wells, actual impairment to such rights is not required. Id. As recognized by one court, a senior rights holder should not “have to suffer actual impairment [from exempt wells]. . .It will do little good for [the senior water rights holder], and other similarly situated, to sit idly and wait for actual impairment. When the water is gone it will be too late.” Ex. 8 at ¶ 21; see also Ex. 10 at 20 (Water Policy Interim Committee testimony that “a person cannot see the point of no return [in terms of impacts] until that point has passed.”). This is especially true with respect to impacts from exempt wells that are difficult to detect. As explained by DNRC, “[d]epletions by exempt well use do not show up in records of total basin water outflow because they are offset by curtailed use by junior surface water users.” Ex. 13 at 7.¹²

In this case, petitioners' senior water rights are being threatened by DNRC's current Rule which fails to protect their rights from the combined appropriations of many small ground water developments. Katrin Chandler, Betty Lannen, and Polly Rex, for instance, are three senior water rights holders in the Horse Creek watershed who are

¹² This is precisely the case in the Gallatin River and other closed basins where water shortages occur nearly every year. See Ex. 13 at 7.

justifiably concerned about how a new 67 lot subdivision – Crow Chief Meadows Inc. – may threaten their existing rights. See Ex. 17, 18, 19.¹³ As explained by Ms. Lannen:

At full build-out, the Crow Chief Meadows subdivision with 67 individual wells will be authorized to pump up to 670 acre feet of water a year from the Horse Creek watershed. I believe, based on my knowledge of the area, that this authorized amount of water, in conjunction with other uses in the watershed, may affect my senior rights and ability to run my ranch which is worthless without an adequate supply of water.

Ex. 18 at ¶ 3. Ms. Chandler agrees, expressing her own concerns that the new subdivision’s wells will threaten her senior rights. See Ex. 17 at ¶ 3. Ms. Chandler’s concerns, in particular, are based on the extensive hydrological studies of the Horse Creek

¹³ Katrin Chandler lives on a ranch near Absarokee, Montana that belonged to her “family and distant relatives since 1917.” Ex. 17 at ¶ 2. One of her relatives, established an extensive irrigation system in the 1920's and supplied the town of Absarokee with ice for their ice boxes out of the historic ice pond on Horse Creek. Id. Ms. Chandler’s family still uses this pond “as a point of division for our water right on Horse Creek” and states they her family still relies on “water from Horse Creek as [their] main source of stock-water in the winter time.” Id. Ms. Chandler’s family also relies on “the springs on our dry land pastures for stock-water year round.” Id. These “water sources have been used for agricultural purposes since 1917.” Id. Betty Lannen also lives in the Horse Creek watershed near Absarokee, Montana. See Ex. 18. Ms. Lannen lives “on a ranch southwest of Absarokee which was purchased in 1943 by [her] parents.” Ex. 18 at ¶ 2. Ms. Lannen, who has lived on the ranch since she was 16, purchased the property from her parents in 1974. Ms. Lannen’s ranch includes a number of senior water rights, including rights to West Rosebud Creek (priority date March 3, 1920), a domestic well (priority date December 31, 1900), and various springs that have and continue to be used for stockwater. See id. Polly Rex “was raised in Absarokee on a ranch west of town” where she now resides full-time.” Ex. 19 at ¶ 2. Ms. Rex’s family raises “Angus cattle, dry land wheat and hay.” Id. The “dry land portion of the ranch, approximately 1,250 acres . . . is served by numerous springs” with water rights that date back to 1917 and 1919. See id. Ms. Rex “is also the largest shareholder in the Mendenhall Ditch Company , 43 C12179 00 (priority date May 1, 1893, 88 cfs total), which provides water to the irrigated portion of the ranch” from the Stillwater River. Id. at ¶ 2.

watershed's groundwater resource which show that the fractured bedrock aquifer feeding Horse Creek and individuals' springs is a "limited local recharge area with poor storage." Id. at ¶ 4. Ms. Chandler notes that DNRC's own 42 hour pumping test in the area demonstrated a "lack of well recovery and poor storage of the aquifer." Ex. 17 at ¶ 4. For this reason, Ms. Chandler believes that "if Crow Chief Meadows [had] to file for a permit for the combined appropriation of water from the entire 67 lot subdivision, as required by the Montana Water Use Act, that the permit application would not have been approved because a simple pumping test would have shown impact on senior water right holders in the area including those water users in the Crow Chief [Meadows] subdivision." Id. at ¶ 5; see also Ex. 19 at ¶ 3 (670 acre feet of water per year for the subdivision is "a number I believe exceeds the local recharge").¹⁴

A recent review of hydrologic studies from the Horse Creek watershed by John Gerstle, an engineer specializing in water resource planning, water rights evaluation, and hydrology reveals that the petitioners' concerns are valid. See Ex. 16.¹⁵ In reviewing DNRC's reports, for instance, Mr. Gerstle noted that the Agency's own hydrologist recognized that "there will be impact from both the existing and potential future exempt

¹⁴ As of November 11, 2009 46 of the 67 lots in the Crow Chief Meadows subdivision have already been sold and 21 lots remain available. See Ex. 21.

¹⁵ The ten documents reviewed by Mr. Gerstle are listed in paragraph 5 of his declaration. See Ex. 16 at ¶ 5. All of these documents are or should be on file with DNRC. If not, or if DNRC would like additional copies of the documents, petitioners can provide them upon request.

wells . . .” Ex. 16 at ¶ 12. In DRNC’s own words:

. . .Of course, flows to springs in other parts of the study area or surface waters at study area boundaries will be reduced when drawdown propagates away from Crow Chief Meadows . . .

Under worst case assumptions, springs in the Horse Creek Drainage could dry up and average annual flows in Horse Creek could be reduced by 25 percent during dry years upon full build out. However, the effects of the withdrawals will be distributed outside the Horse Creek drainage as drawdown propagates along faults.

Id. (quoting DNRC report).

Review of the water rights on Horse Creek and Rosebud Creek (including those held by petitioners) in the area of concern “indicates that there are a number of surface, spring, and groundwater rights which would be adversely impacted by diminished rates and duration of flows due to increased groundwater extraction and use.” Ex. 16 at ¶ 14. According to Mr. Gerstle, because “the rates and duration of Horse Creek surface flows are so limited and existing rights claim most, if not all, of the available water, even a small decrease in flows would result in material consequences for the water rights dependent upon the surface flows of Horse Creek and its tributary springs and groundwater accretions.” Id. “Although there are significant differences in the assumptions and conclusions of the [various studies] . . . both identify consequences which could have impacts on wells, springs, and surface waters. These impacts are likely to result in injury to the owners of existing surface water rights diverting from Horse Creek, and possibly those on Rosebud and Grove Creeks as well.” Id. at ¶ 15.

In Montana’s Gallatin River valley, DNRC has determined that exempt wells are

depleting surface water flows in the Gallatin River and affecting senior water right holders. See Ex. 13; see also Ex. 14 (study demonstrating how groundwater pumping in Gallatin Valley can impact surface-water flows). According to DNRC, but for the curtailment of junior surface rights (many of which date back to 1890) and voluntary reductions that offset the impacts of exempt wells, the Gallatin River during periods of shortages would go dry at Amsterdam Road Bridge and I-90 Bridge. See Ex. 13 at 3. “Depletion of surface water by exempt well use continues during these periods of shortages and ultimately increases the need to curtail more junior surface water rights or the need for more voluntary reductions.” Id. In DNRC’s own words: “This can create the anomaly of a surface water right holder with a 1920 priority date for irrigation being shut off during water shortages, while a groundwater right holder with a 2007 priority date can continue pumping, even though their water use depletes stream flow.” Id. at 1.

This is where Joseph Miller, a rancher in Manhattan, Montana has senior water rights. See Ex. 22.¹⁶ As a senior water rights holder in the Gallatin Valley and a rancher who depends on having an adequate supply of water in order to make a living, Mr. Miller is concerned about how subdivision and new home development has impacted his senior rights. In Mr. Miller’s own words:

¹⁶ Mr. Miller is co-owner of the 500 acre E.H Miller Ranch. See Ex. 22 at ¶ 1. Mr. Miller has a number of water rights, including surface rights to the West Gallatin River that date back to 1865, surface rights to Baker Creek, domestic wells, and rights to approximately 19 springs. See Ex. 22 at ¶ 2.

I believe that this growth is lowering the water table and affecting my senior rights. Spring Creek on my ranch was once inhabited by fish but is now completely dry. In fact, all of the springs on my ranch dried up completely after what I call the “Hollywood Hills” subdivision was built which lowered the water table. As the water table lowers my ditches use more water.

Ex. 22 at ¶ 4.

Another petitioner – the Clark Fork Coalition (CFC) - has senior rights in the Upper Clark Fork watershed. See Ex. 20.¹⁷ “As a senior water rights holder in the upper Clark Fork watershed – a closed basin that is already fully-appropriated – CFC is concerned about how DNRC’s issuance of exempt wells in the closed basin may impact the Dry Cotton Creek Ranch’s water rights.” Id. at ¶ 5. According to CFC, as growth continues in the Clark Fork watershed (an average of 10% a year) so will the “demand for groundwater for residential development [that] . . . will create more strain on water right holders in already over-appropriated basins like the upper Clark Fork.” Id. at ¶ 13. And, while the Deer Lodge Valley has historically been insulated from western Montana’s rapid growth due to its Superfund status, “in the past decade the area adjacent to [CFC’s] ranch has seen an increase in homes with individual wells . . . the rate of development is

¹⁷ CFC “is the sole owner of Clark Fork Restoration, LLC, which has an ownership interest in and is managing partner of Dry Cottonwood Creek Ranch, LLC, a 2,300 acre working cattle ranch located east of the Clark Fork River in the Deer Lodge Valley near Galen, Montana.” Ex. 20 at ¶ 2. CFC’s ranch “holds a number of senior water rights used for stock watering, as well as to irrigate approximately 200 acres of crops, including alfalfa, wild hay, and a small oat crop.” Id. This includes water rights from the Clark Fork River, Dry Cottonwood Creek, and Lost Creek that date back to 1875, 1883, and 1869. Id.

expected to increase as the fishery and other natural amenities are restored.” Id. at ¶ 14.

The “drilling of hundreds or thousands of individual exempt wells into the alluvial aquifers that feed the upper Clark Fork River is certain to adversely affect streamflows in an already chronically dewatered river.” Id. at ¶ 15.

Although located in different parts of the State, all of the petitioners share the same concern over the impacts of exempt wells on their senior rights and the water resource. All of the petitioners are threatened by DNRC’s arbitrary Rule which fails to require permits for combined appropriations from the same source aquifer that are having and will continue to have a significant, cumulative effect on senior rights, especially in closed basins.¹⁸ Indeed, such concerns are acknowledged by DNRC who stated in testimony before the WPIC that exempt wells “deplete water and impact senior rights” and present “a problem for senior water users”. See Ex. 10 at 15, 16. In DNRC’s own words:

[T]here is concern among senior water rights holders that the cumulative effects of many small ground water developments can have significant impacts in terms of reducing ground water levels and surface water flows over the long term, and may be creating same types of adverse effects that the permitting system was intended to protect them against. This concern is justified not just based on the absence of regulatory review of new development, but also because there is no effective or efficient mechanism for enforcing their senior priority dates against these junior ground water users.

Ex. 12 at 1. In a February, 2008 DNRC Staff Report entitled “Effects of Exempt Wells

¹⁸ Pursuant to Rule 1.2.227 (2)(h), ARM, this petition includes the names and addresses of persons known by the petitioners to be interested in the requested declaratory ruling.

on Existing Water Rights,” the Agency expresses concern that “exempt wells can pump water out of priority which in turn reduces the water available to senior water users during the times of water shortages. This concern is elevated as exempt wells are being used for large, relatively dense subdivision development in closed basins.” Ex. 13 at 1; see also Ex. 14.¹⁹

C. DNRC’s definition undermines the Montana Constitution and the prior appropriations doctrine.

The Montana Constitution provides that the “state and each person shall maintain and improve a clean and healthful environment in Montana for future generations” and that the legislature must “prevent unreasonable depletion and degradation of natural resources.” Article IX, § 1 Mont. Const. The Montana Constitution also explicitly recognizes existing water rights as a fundamental right that must be protected (see Article IX, § 3 (1)) and provides each citizen with the right to “due process of law.” See Article II, § 17 Mont. Const.

Here, DNRC’s arbitrary interpretation of the term “combined appropriation” which exempts wells from the Act’s procedural safeguards unless they are “physically manifold” creates a huge loophole that, as described above, fails to “prevent unreasonable depletion

¹⁹ Just last summer, Washington State’s Department of Ecology issued an emergency rule prohibiting all new groundwater withdrawals in the Yakima River basin within Kittitas County, due to unresolved issues surrounding the proliferation of exempt wells and their potential impact on senior water rights. See Ex. 9 (copy of emergency rule).

and degradation” of Montana’s groundwater resource, fails to ensure adequate protections are in place for senior water right holders, and deprives Montana’s citizens of due process.

Under DNRC’s Rule, there is no limit or cap on the amount of exempt wells that subdivisions and other developments can obtain, even in closed basins that are already fully-appropriated. For example, under DNRC’s interpretation, a 100, 1,000, or even 10,000 lot subdivision in a closed basin would escape all permitting and MEPA review if each individual homeowner within the subdivision drills their own well and uses less than 10 ac-ft-yr. Collectively, a 1,000 lot subdivision would be authorized to use up to 10,000 ac-ft-yr of water without a permit. Without question, the effects of these small wells on the ground water resource and senior rights are identical to the effects caused by a single, large well. As recognized by the Ninth Circuit, “[s]ometimes the total impact from a set of actions may be greater than the sum of the parts.” Klamath-Siskiyou Wildlands Center v. BLM, 387 F. 3d 989, 994 (9th Cir. 2004). The addition of “a small amount of sediment to a creek may have only limited impact . . . But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean no salmon survive.” Id. at 994.

The same principle applies to DNRC’s issuance of multiple exempt ground water wells, especially in places like the Horse Creek watershed or closed basins like the

Gallatin River Valley and Upper Clark Fork watershed where water is already fully-appropriated. Individually, each well pumping up to 10 ac-ft-yr of water from each lot of a subdivision may only have an incremental or nominal effect. But in the aggregate, an entire 100 lot subdivision pumping up to 1,000 ac-ft-yr of water from the same source aquifer may add up to something much greater and may impact senior water rights holders. In DNRC's own words: "the cumulative effects of multiple small ground water use upon surface flows may be identical to the effects of a single large well." Ex. 12 at 10. A "100 individual wells serving a subdivision will have the same magnitude of depletion as one or more larger non-exempt wells for a public water system serving the same number of households from the same aquifer at that location." Ex. 13 at 2. The Montana Department of Fish, Wildlife & Parks agrees, noting that:

[T]he size and number of lots in today's subdivisions, coupled with the use of section 306 for subdivisions water supply is having a negative and cumulative impacts on the water resource upon which Montana's fisheries rely and on instream flow rights (both reservations and Murphy rights) that are held in trust for the benefit of all Montanans.

Ex. 5 at 20.

According to DNRC, the petitioners' concerns over cumulative impacts to senior water right holders from the exempt wells are "justified." See Ex. 12 at 1; see also Ex. 13 at 1 ("exempt wells can pump water out of priority which in turn reduces water available to senior water users"). For this reason, DNRC explicitly recognized that "groundwater use under the exemption statute and the definition of 'combined appropriation' must

continue to be scrutinized to be consistent with the purposes of the prior appropriation doctrine, its many codifications in the Water Use Act, and the intent of the Legislature.” Ex. 5 at 11. A New Mexico court recently dealt with this very issue, finding the state’s exempt well statute to be unconstitutional because it allows the state to issue exempt well permits “without any consideration of the availability of unappropriated water or the priority of appropriated water” and lacks “protection for senior appropriators.” Ex. 8 at ¶ 23, ¶ 25 (Horace Bounds Jr. v. State of New Mexico, CV-2006-166 (Dist. NM 2008)). DNRC’s Rule lacks similar protections for Montana’s senior water rights holders in violation of the Montana Constitution.

Moreover, because no permit is required for exempt wells, there are no procedural safeguards in place to ensure that senior rights are protected and no environmental review under MEPA. Nor is there anyway for senior rights holders to obtain due process of law by, at the very least, receiving notice and being given the right to object to the issuance of certificates of water rights for these exempt wells.

II. DNRC Should Initiate Rulemaking to Amend the Definition of “Combined Appropriation.”

After declaring the definition of “combined appropriation” invalid for the reasons stated above, DNRC should exercise its authority pursuant to the MAPA, § 2-4-315, MCA and immediately initiate rulemaking to amend the definition.

According to DNRC’s own records, “from July 1, 1973 to September 1, 2007,

approximately 103,318 certificates of water rights have been issued in Montana under the small ground water use permitting exemption” and there has been “a slow, gradual trend of an increase in the number of certificates issued since about 1987.” Ex. 12 at 5.

Approximately 29,880 certificates of completion for exempt wells were issued in an eight year period, between 2000 and 2008 and “DNRC estimates that by 2020, there could be between 32,000 and 78,000 additional exempt wells” in the State of Montana. Ex. 15.²⁰

The number of exempt wells filed in closed basins alone, for instance, “has increased steadily at a rate of approximately 1,400 per year.” Ex. 13 (see Table 3). According to DNRC’s own estimates, at current rates of development, “approximately 30,000 new exempt wells could be added in closed basins during the next 20 years resulting in an additional 20,000 acre-feet per year of water consumed.” Ex. 13 at 1. By 2060, DNRC estimates the total number of exempt wells in the Bitterroot, Jefferson/Madison, Teton, Upper Clark Fork, and Upper Missouri closed basins will “increase by approximately 70,000 from the current numbers” to a total of 90,000 exempt wells. Id. at 6. This will result in “an additional 47,000 acre-feet of water being consumed [in these closed basins] per year by 2060.” Id.²¹ “If these trends continue and the law is not changed, these

²⁰ Use of the exemption has been concentrated in Montana’s high growth counties such as Ravalli, Flathead, Gallatin, Lewis & Clark, Missoula and Yellowstone County. These counties “accounted for about half of all the exempt Certificates issued.” Ex. 12 at 5.

²¹ DNRC’s predictions for 2060, which assume a ½ acre of irrigated lawn with each home, are as follows: 13,000 ac-ft/yr of depletion (loss of surface water) in the Bitterroot, 6,000 ac-ft/yr of depletion in the Jefferson/Madison, 21,000 ac-ft/yr of

numbers will continue to increase over time.” Ex. 12 at 11. Without question, as the number of subdivisions and developments taking advantage of DNRC’s exempt well loophole increases throughout Montana, so too will the cumulative impacts to Montana’s groundwater resources and senior water rights holders. Time is therefore of the essence.

Petitioners are aware that in 2006 DNRC received and denied a previous petition from Gallatin County to alter and replace the definition of “combined appropriation.” See Ex. 4, 5. Unlike Gallatin County’s 2006 request, however, this petition does not recommend specific replacement language for the definition of “combined appropriation” but instead requests DNRC declare the Rule invalid and immediately initiate rule making to amend the Rule to make it consistent with the Act. No specific, proposed changes to the Rule are therefore requested, necessary, or appropriate at this time. This general request for rule making is consistent with the MAPA. See § 2-4-501, MCA (declaratory rulings), § 2-4-315, MCA (petition to amend).

DNRC’s Rules however, do mandate that where “amendment of an existing rule is sought, the rule shall be set forth in the petition with proposed deletions interlined and proposed additions underlined.” Rule 1.3.308 (1)(a)(iii), ARM. As such, to the extent that DNRC requires the submission of proposed rule before considering this petition, petitioners hereby respectfully submit the following, proposed definition to replace Rule

depletion in the rest of the Upper Missouri, and 6,000 ac-ft/yr of depletion in the Upper Clark Fork” Basins. Ex. 12 at 11.

36.12.101 (13), ARM:

(13) “Combined appropriation” means an appropriation of water from the same source aquifer by two or more ~~groundwater developments wells or developed springs that are part of the same project, development, or subdivision. physically manifold into the same system.~~ Two or more wells or developed springs that are part of the same project, development, or subdivision are presumed to appropriate water from the same source aquifer.

This proposed definition is submitted for the sole purpose of complying with Rule 1.3.308 (1)(a)(iii), ARM. It is nothing more than a proposal, “a model or point of departure” for DNRC’s consideration if and when it initiates rulemaking to amend the definition of “combined appropriation.” See Common Cause of Montana v. Argenbright, (1996), 276 Mont. 382, 388-89, 917 P.2d 425, 429 (citation omitted).

In denying Gallatin County’s earlier petition, the petitioners are also aware that DNRC raised concerns over the “logistical and financial difficulty to the Department.” Ex. 5 at 3. According to DNRC, if the exempt well loophole is closed for combined appropriations the agency’s permit “application load would increase 320% from approximately 500 to approximately 2,100 if each individual subdivision well required a permit application.” Id. at 4. DNRC states that in order to process 1,600 additional applications at the current rate staffing would need to be increased by 46.4 water rights specialists and the Agency does not have the legislative approval nor budget for those employees. See id. at 4.

While petitioners are certainly sympathetic to DNRC’s budgetary shortfalls and staffing needs, this “lack of adequate resource” argument – no matter how valid – cannot

be used as an excuse for non-compliance with the law. See Center for Biological Diversity v. Norton, 304 F. Supp. 2d 1174 (D. Ariz. 2003) (rejecting lack of agency funding as an excuse for non-compliance with statutory mandate); Forest Guardians v. Babbitt, 174 F.3d 1178, 1192 (10th Cir.1999) (same). As explained by one court, “[b]udgetary constraints, far from being exceptional, are an everyday reality.” Center for Biological Diversity, 304 F. Supp. 2d at 1179. “To the extent the [agency] feels aggrieved by Congress’ failure to allocate proper resources in which to comply with [its] statutory duty, Congress, not the courts, is the proper governmental body to provide relief.” Id. at 1179 (citations omitted).

Here, the legislature expressly mandated the DNRC issue permits for “combined appropriations from the same source from two or more wells” that exceed the 35 gpm/10 ar-ft-yr limitation. See § 85-2-306 (3)(a), MCA. Such permits are integral to protecting Montana’s water resources and senior water rights holders. If DNRC requires more legislative funding and staffing to fulfill this statutory duty and ensure that water resources and existing rights are protected, then it should address its concerns to the legislature. Until then, however, DNRC cannot evade its statutory duties because of budgetary constraints.

Moreover, DNRC’s concern over receiving a deluge of water permit applications is likely unfounded. Conventional wisdom suggests that if DNRC amends the definition of “combined appropriation” and closes the loophole it will not be inundated with

thousands of new permit applications. This is because the number of exempt well certificates would not equal the number of new permits. See Ex. 11 at ¶ 6. Instead of receiving 200 permit applications for all 200 wells in a new subdivision, for instance, DRNC would likely receive a single application for all the wells in a subdivision. In the alternative, DNRC may only receive a few applications for a community well or a single application to tie the development into a public water supply system. See id.²²

Finally, in denying Gallatin County’s petition, DNRC maintained that closing the exempt well loophole would completely halt “all new subdivision development, including individual, [and] rural homes for which a community system is not an option in the Upper Missouri and other similar closed basins.” Ex. 5 at 6. This is incorrect. In closed basins where surface waters are already fully-appropriated, developers can still appropriate water for subdivisions that exceed the 35 gpm/10 ac-ft-yr limitation provided they prepare a hydrologic assessment pursuant to §§ 85-2-360, 85-2-361, MCA.²³ The hydrologic assessment must analyze whether the new groundwater appropriation would result in a net depletion of surface water and would adversely affect senior water rights. See § 85-2-

²² According to DNRC, community water systems are usually “more efficient than individual wells in terms of infrastructure costs in terms of well drilling, pumping costs, and water quality treatment if necessary.” Ex. 12 at 12.

²³ This provision was added to the Act in 2007 in response to the Montana Supreme Court’s mandate to consider the impacts of groundwater depletions on surface water rights. See Montana TU v. Montana Department of Natural Resources and Conservation (2006), 331 Mont. 483,133 P. 3d 224 226.

361, MCA. If so, the applicant must create a way to offset the net depletion through a mitigation plan or an aquifer recharge plan. See § 85-2-362, MCA.

In lieu of preparing a hydrologic assessment, developers may also appropriate water in a closed basin by: (1) qualifying for an exception to the closure rule (see § 85-2-343 (2), MCA); (2) hooking into an existing water system; or (3) purchase existing water rights in the basin. Smaller subdivisions and individual lot owners could also continue to use the exemption in closed basins so long as they fell below the 35 gpm/10 ac-ft-yr threshold. The bottom line is that in closed basins where surface water rights are already fully appropriated, DNRC cannot and should not create a water right out of thin air or where no water exists in order to appease developers and accommodate new subdivisions.

Moreover, by closing the exempt well loophole, especially in closed basins, land adjacent to existing public water systems or land that already has sufficient water rights would be properly valued and targeted for development. See Ex. 11 at ¶¶ 4,5. This would allow for the creation of a market for water rights that would: (1) help supply new developments with water; and (2) give farming and ranching families fair market value for their water. Indeed, as it now stands, there is absolutely no incentive to purchase existing water rights, develop community water projects, or to tap into pre-existing municipal water systems. As explained by Tim Davis, the Director of the Montana Smart Growth Coalition: “DNRC’s rules . . . create[] a loophole that has told the market to develop lands away from public water systems by making developments that rely upon

exempt wells essentially free and fast. Exempt wells are fast because they receive an automatic certificate . . . [and] free because the developer does not have to pay to put [in] any pipes, pay to drill wells for each lot, nor pay to put any other water infrastructure in place before selling the lots. The developer doesn't even have to pay for the water itself when using exempt wells.” Ex. 11 at ¶ 5; see also Ex. 10 at 11 (Mr. John Tubbs’ testimony to the WPIC on how “exempt wells are the least expensive and least time consuming” way to obtain water rights for developers).

By contrast, if a developer “wants to use a community well or hook up to an existing community or public water system then the developer must go through a lengthy permitting process and pay for both the water and to lay the pipes and put other water infrastructure in the ground throughout the entire development before selling any lots.” Id. As a result, most development in Montana has taken place with exempt wells on the outskirts of our cities and towns over the last 25-30 years because the exempt well loophole has made it the easiest, fastest, and most profitable way to subdivide land regardless of the cost . . . to senior water rights holders.” Id.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that: (1) DNRC issue a declaratory ruling that the Rule defining “combined appropriation” is invalid for the reasons articulated above; and (2) immediately initiate rule making pursuant to § 2-4-315, MCA to amend the definition.

Respectfully submitted this ____ day of November, 2009.

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